IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-562

HAROLD E. RANKIN, JR.,

Petitioner,

vs.

TEXACO, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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Petitioner Harold E. Rankin, Jr. respectfully prays that a Writ of certiorari issue to review the judgment and memorandum opinion of the United States Court of Appeals for the Ninth Circuit entered on April 27, 1979.

OPINION BELOW

The unreported memorandum opinion of the Court of Appeals, and its order denying a petition for rehearing and rejecting a suggestion for rehearing en banc, appear in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on April 27, 1979. A timely petition for rehearing en banc was denied on July 7, 1979, and this petition for certiorari is filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

In this civil case, the district court inadvertently instructed the jury that plaintiff (petitioner herein) must prove his case beyond a reasonable doubt. The court then attempted to correct its error by re-reading the instruction which

preceded and followed the erroneous one, omitting the erroneous one but not clearly and specifically directing the jury to disregard it. Later in the charge, the court gave proper instructions on plaintiff's burden to prove his case by a preponderance of the evidence. Plaintiff failed to object to the charge as given. The jury returned a verdict for defendant Texaco.

On this petition following the Court of Appeals' affirmance of the judgment, the following issues are presented:

1. Should this Court now expressly adopt the "plain error" or "fundamental error" exception to Rule 51 of the Federal Rules of Civil Procedure, applied in civil cases in every federal judicial circuit save the Ninth?

2. If so, did the district court's contradictory instructions on plaintiff's burden of proof, not corrected by a clear and specific admonition, contain such potential for prejudice that they constitute fundamental error warranting reversal?

RULE INVOLVED

Rule 51 of the Federal Rules of Civil Procedure provides in pertinent part:

> ". . . No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection . . . ."

STATEMENT OF THE CASE

A. Procedural Background.

Plaintiff and petitioner Harold E. Rankin, Jr. (hereinafter "plaintiff"), a Texaco service station lessee-operator, brought this damage action, based on breach of contract and fraud, against defendant and respondent Texaco, Inc. (hereinafter "Texaco") for damages for failure to supply plaintiff with the necessary gasoline to maintain his

business, thus forcing plaintiff out of business. The suit was filed in the Orange County, California, Superior Court [C.R. 6] and was removed by Texaco to the federal district court pursuant to 28 U.S.C. § 1441, the district court having diversity jurisdiction under 28 U.S.C. § 1332 [C.R. 1-3, 266].

The case was tried to a jury. During the charge to the jury, the district court stated [Supp. R.T. 317:7-19]:

> "The law makes no distinction between direct and circumstantial evidence, but simply requires that, before convicting a defendant, the jury must be satisfied of the defendant's guilt beyond a reasonable doubt -- Excuse me.
>
> "That, ladies and gentlemen, is what I am talking about in the late hours.
>
> "Let me restate that to you, ladies and gentlemen. I just defined for you circumstantial and direct evidence.

"It is not necessary that facts be proved by direct evidence. They may be proved also by circumstantial evidence or by a combination of direct evidence and circumstantial evidence. The law makes no distinction between direct and circumstantial evidence."

The trial court then continued with the reading of the instructions, including a correct instruction that plaintiff's burden was to prove his claim by a preponderance of the evidence [Supp. R.T. 319:1-18].

It should be noted that the trial court did not expressly tell the jury to disregard the earlier instruction that the jury could not hold against the defendant unless they were satisfied of the defendant's guilt "beyond a reasonable doubt". The court merely restated the instruction regarding direct and circumstantial evidence, leaving out (without explanation to the jury) the statement of the beyond-a-reasonable-doubt standard.

The jury returned a verdict for Texaco and stated in answer to two special interrogatories that, under the instructions given them, Texaco was not liable to plaintiff for breach of contract or fraud [Supp. R.T. 343:7 to 344:8; C.R. 248]. Judgment was entered accordingly [C.R. 249].

Plaintiff's motion for new trial [C.R. 498] was denied [C.R. 251], and plaintiff appealed [C.R. 252], contending that the district court's attempt to correct its instructions did not satisfy the requirements set forth in Seltzer v. Chesley, 512 F.2d 1030 (9th Cir. 1975), and cases cited therein. The Court of Appeals held that it could not review this alleged error because (1) plaintiff failed to object to the instructions pursuant to Rule 51, and (2) the Ninth Circuit has not adopted the plain error doctrine in civil cases. See Memorandum in Appendix hereto.

B. Statement of Facts.

Plaintiff had been in the service station business since 1964 [R.T. 110:24

to 111:16]. He had operated a Shell station and had built it to the point where he was selling over 50,000 gallons of gasoline a month, when Shell effectively increased his rent about $500.00 a month. In December 1969, plaintiff arranged with Texaco to take over and re-open a closed Texaco station on Newport Boulevard at Victoria in Costa Mesa, California (the "Newport-Victoria station") as a favor to Texaco while plaintiff waited for another station, one he particularly wanted, to become available [R.T. 134:16 to 143:13, 193:5 to 194:12, 213:17 to 217:11]. On December 18, 1969, plaintiff and Texaco executed a package of Texaco form documents, including a lease [Ex. 1], an agreement for the purchase and sale of gasoline [Ex. 2], and a gasoline storage and withdrawal (GSAW) agreement [Ex. 3] [R.T. 109:9 to 110:23]. (Although Texaco promised plaintiff he was first on the list for the other station, when the other station became available in 1970, it was given to someone else [R.T. 143:15 to 144:12, 216:25 to 217:11].)

Pursuant to Exhibit 2, Texaco was required to sell and deliver to plaintiff his gasoline requirements up to annual maximums of 450,000 gallons of Ski Chief and 270,000 gallons of Fire Chief, a total of 720,000 gallons per year or an average of 60,000 gallons per month. Plaintiff built up the Newport-Victoria station until, in the first four months of 1973, Texaco was selling him an average of over 55,000 gallons per month [R.T. 114:3-10, 115:11-14, 116:3-4].

In 1973 a worldwide shortage of crude oil and refined petroleum products was announced [R.T. 116:12-17]. On May 10, 1973 the federal government announced a voluntary program of allocation of crude oil and refined petroleum products [R.T. 116:2 to 117:2; Exs. E, F]. In general, the oil companies were requested to make available to their customers the available supplies in proportion to each customer's purchases during an earlier base period [Exs. E, F].

As it turned out, in 1973 Texaco's worldwide production of crude oil, and manufacture of crude oil into gasoline

and other products, actually exceeded its production and manufacture during 1972, and Texaco's net income increased from $820 million in 1972 to $1 billion 243 million in 1973 [R.T. 305:17 to 312:13; Ex. 25]. Plaintiff, however, did not share in this good fortune. While other Texaco retailers received 20,000 gallons a month over their allotted number of gallons [Supp. R.T. 213:10-22, 220:16-23], plaintiff, for reasons explored at the trial, was unable to obtain from Texaco the gasoline he needed to maintain his business, and was forced out of business in early January of 1974 [R.T. 159:17 to 160:16; Supp. R.T. 152:16-24, 156:4-6], losing both his investment of over $20,000.00 and the sole source of support for himself and his family [R.T. 194:17-19, 198:25 to 199:2]. Financially unable to obtain another service station, plaintiff now drives a tanker truck for a living [R.T. 171:13-17].

The central issue in this case was whether Texaco fairly and in good faith had made available to plaintiff all the gasoline it was obligated to make available pursuant to the allocation program

(see California Commercial Code §§ 2615, 1203) and pursuant to representations allegedly made by Texaco to plaintiff.

The evidence was in conflict. According to plaintiff, his sales representative at Texaco, Mari Vandenberg, told him in May 1973, after the allocation program was announced, that Texaco had all the gasoline he wanted and not to worry [R.T. 126:11-17; Supp. R.T. 98:22 to 99:1]. However, he was unable to obtain several deliveries that month and thereafter [R.T. 126:18 to 127:14, 150:4-20, 167:17-21, 268:24 to 269:15].

In meetings on November 19, 1973 and December 3, 1973 with Mari Vandenberg and her supervisor, Tom Hughes, plaintiff and Texaco tried to resolve their differences [R.T. 123:21-23, 148:1-18]. According to plaintiff, on November 19, 1973 Texaco acknowledged that plaintiff's June allocation was 27,000 gallons lower than it should have been [R.T. 149:11-17, 186:18 to 187:11], and promised that if he allowed Texaco to close a second station ("Harbor-Heil") he had acquired for his son in 1972 [R.T. 111:25 to 112:7, 218:

14-18], Texaco would transfer the Harbor-Heil allocation to his Newport-Victoria station and give him 67,000 to 68,000 gallons of gasoline in December [R.T. 148:19 to 149:1, 152:8 to 153:18]. Relying on Texaco's representations, plaintiff agreed, ordered a load of gasoline, and re-opened the Newport-Victoria station which had been closed since late October for lack of gasoline [R.T. 150:4-6 and 19-20, 153:20-25, 169:8 to 170-19]. Again, the gasoline was not delivered promptly [R.T. 154:1-15]. (Meanwhile, Texaco closed the Harbor-Heil station and tore it down [R.T. 155:2-3].)

Thereafter, in December and early January, 1974, plaintiff continued experiencing difficulties obtaining delivery of gasoline [R.T. 158:16 to 159:16] and finally, unable to meet payroll and operate his business, he was forced to close down permanently on January 7, 1974 [R.T. 159:17 to 160:16; Supp. R.T. 152:16-24, 156:4-6].

Plaintiff had not realized at first that it was Texaco, and not the federal government, which was determining the

allocations [Supp. R.T. 105:1-14]. Once he became aware, he complained to Texaco continuously that he was not being treated fairly [Supp. R.T. 118:19 to 121:14]. According to plaintiff, during the six-month period June-November 1973, Texaco failed to deliver to him 193,654 gallons to which he was entitled under the allocation program [R.T. 187:17-24; Supp. R.T. 84:12-19]. Since his net profit was about five cents a gallon [R.T. 195:18 to 196:9], his lost profits on the undelivered gasoline were $9,683.70. Further, in addition to the loss of his $20,000.00 investment, plaintiff's damages for being forced out of business were calculated over the contract period at lost profits of $332,779.00 [see Supp. R.T. 270:5-6].

In contrast, Texaco's witnesses asserted that Texaco tried to be fair and treated plaintiff the same as any other Texaco retailer [R.T. 357:5-15, 413:13-15]. Tom Hughes denied that Texaco made any errors in calculating plaintiff's monthly allocations [R.T. 342:16-21] and denied he agreed to transfer the Harbor-Heil station allocation to the Newport-

Victoria station [R.T. 343:21 to 344:15, 347:16-22, 349:9-21]. Mari Vandenberg similarly denied agreeing to transfer the Harbor-Heil allocation to Newport-Victoria [R.T. 408:5-10], and claimed that if there was any error in calculating plaintiff's allocations, it was only a "small discrepancy" [R.T. 415:6-18].

Thus the evidence was in serious conflict and the burden of proof placed upon plaintiff by the jury instructions was of critical importance.

REASONS FOR GRANTING THE WRIT

THE NINTH CIRCUIT'S CONTINUED REFUSAL TO RECOGNIZE A PLAIN ERROR RULE IN CIVIL CASES CONFLICTS WITH THE DECISIONS OF EVERY OTHER CIRCUIT IN THE INTERPRETATION OF RULE 51 OF THE FEDERAL RULES OF CIVIL PROCEDURE, AND RAISES AN IMPORTANT QUESTION REGARDING UNIFORM APPLICATION OF THE FEDERAL RULES.

Every federal judical circuit except the Ninth recognizes a so-called "plain

error" or "fundamental error" exception to the requirement of a timely objection to instructions under Rule 51. For representative cases from each circuit, see:

Montgomery v. Virginia Stage Lines, 191 F.2d 770, 774 (D.C. Cir. 1951);

Morris v. Travisono 528 F.2d 856, 859 (1st Cir. 1976);

Frederic P. Wiedersum Assoc. v. Nat. Homes Constr., 540 F.2d 62, 66 (2nd Cir. 1976);

Paluch v. Erie Lackawanna Railroad Co., 387 F.2d 996, 999-1000 (3rd Cir. 1968);

Edwards v. Mayes, 385 F.2d 369, 373 n. 1 (4th Cir. 1967);

Ind. Dev. Bd. of Tn. of Section, Ala. v. Fugua Industries, 523 F.2d 1226, 1237-1241 (5th Cir. 1975);

O'Brien v. Willys Motors, Inc., 385 F.2d 163, 166 (6th Cir. 1967);

Celanese Corp. of America v. Vandalia Warehouse Corp., 424 F.2d 1176 1181 (7th Cir. 1970);

O'Malley v. Cover, 221 F.2d 156, 159 (8th Cir. 1955);

Pridgin v. Wilkinson,
296 F.2d 74, 76 (10th Cir. 1961).

See also this Court's decision in Hormel v. Helvering, 312 U.S. 552, 557, 61 S.Ct. 719, 721, 85 L.Ed. 1037, 1041:

> "There may always be exceptional cases of particular circumstances which will prompt a reviewing or appellate court, where injustice might otherwise result, to consider questions of law which were neither pressed nor passed upon by the court . . . below. . . .
>
> "Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. A rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with this policy. Orderly rules of procedure do not require sacrifice of the rules of fundamental justice."

Errors in instructing on the applicable burden of proof have generally been considered so fundamental as to warrant reversal even in the absence of proper and timely objection. Sheppard Federal Credit Union v. Palmer, 408 F.2d 1369, 1371-1372 (5th Cir. 1969) ("Burden of proof is always of major importance and, in this case where the evidence was close on the question of good faith, it was crucial."); O'Brien v. Willys Motors, Inc., supra, 385 F.2d 163, 166-167 (Sixth Circuit held law on burden of proof goes to heart of case and error must be noted despite lack of objection); Ratay v. Lincoln National Life Ins. Co. 378 F.2d 209, 212 (3d Cir. 1967), cert. den. 389 U.S. 973 (error in instruction on burden of proof was so fundamental and highly prejudicial as to justify review despite absence of proper objection).

See also Celanese Corp. of America V. Vandalia Warehouse Corp., supra, 424 F.2d 1176, 1181 (despite absence of objection below, Seventh Circuit reversed judgment for misleading character of the charge actually given on the issue of

burden of proof). Cf. Frederic P. Wiedersum Assoc. v. Nat. Homes Constr., supra, 540 F.2d 62, 66 (Second Circuit holds that contradictory, inconsistent or confusing instructions constitute fundamental error reviewable even in the absence of proper objection).

However, for the forty years since the adoption of the Civil Rules in 1938, the Ninth Circuit has refused to apply a "plain error" or "fundamental error" exception to Rule 51. Lynch v. Oregon Lumber Co., 108 F.2d 283, 286 (9th Cir. 1939); Woodworkers Tool Works v. Byrne, 191 F.2d 667, 676 (9th Cir. 1951); Persons v. Gerlinger Carrier Co., 227 F.2d 337, 343 (9th Cir. 1955); Siebrand v. Gossnell, 234 F.2d 81, 96 (9th Cir. 1956); Hargrave v. Wellman, 276 F.2d 948, 950-951 (9th Cir. 1960); Bertrand v. Southern Pacific Co., 282 F.2d 569, 572 (9th Cir. 1960), cert. den. 365 U.S. 816; Crespo v. Fireman's Fund Indemnity Co., 318 F.2d 174, 175 (9th Cir. 1963); Bock v. United States, 375 F.2d 479, 480 (9th Cir. 1967); Monsma v. Central Mutual Ins. Co., 392 F.2d 49, 52-53 (9th Cir. 1968).

The Monsma case, decided over ten years ago, was, to plaintiff's knowledge, the Ninth Circuit's last published refusal to apply the "plain error" exception in civil appeals. Shortly thereafter, Professors Wright and Miller noted that "the Ninth Circuit stands alone in reading Civil Rule 51 literally and denying that there is any power to reverse for plain error in an unobjected-to-instruction in a civil case." 9 Wright & Miller, Federal Practice and Procedure (1971) § 2558, p. 674.

More recently, inconsistencies have appeared in the Ninth Circuit's application of its strict adherence to Rule 51. Thus in Norddeutscher Lloyd v. Jones Stevedoring Co., 490 F.2d 648 (9th Cir. 1973), the Court reversed a judgment for an instructional error, over the dissent of one judge who pointed out (at 654) that no objection had been made to the instructions as given and that in view of the Circuit's previous decisions, reversal could not be had on the basis of "plain error". Again, in Fountila v. Carter, 571 F.2d 487, 493-494 (9th Cir.

1978), the Court deemed an inadvertent error by the district court in reading the instructions to the jury to be prejudicial error although it was apparently not called to the district court's attention.

Further, it is noteworthy that the Federal Rules of Evidence, adopted by Congress in 1975, expressly include a plain error rule which applies to both civil and criminal cases. Rule 103(d) ("Nothing in this rule [governing rulings on evidence] precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court.").

Yet in the present case, the Ninth Circuit, citing Monsma, has once again declined to recognize a plain error rule. Accordingly, plaintiff respectfully suggests that the time has come for this Court to call a halt to the Ninth Circuit's march to its quite different drummer, a march which constitutes a continued "threat to the goal of uniformity of federal procedure", see Hanna v. Plumer, 380 U.S. 460, 463, 85 S.Ct. 1136,

14 L.Ed.2d 8, 12. The "proper interpretation and uniform application" of the federal rules has in the past, of course, been a matter of sufficient public importance to warrant the grant of certiorari. United States v. Schaefer Brewing Co., 356 U.S. 227, 230-231, 78 S.Ct. 674, 2 L.Ed.2d 721, 725; see also Commissioner v. Bilder, 369 U.S. 499, 501, 82 S.Ct. 881, 8 L.Ed.2d 65, 67; Goldlawr v. Heiman, 369 U.S. 463, 465, 82 S.Ct. 913, 8 L.Ed. 2d 39, 41; Hickman v. Taylor, 329 U.S. 495, 497, 67 S.Ct. 385, 91 L.Ed. 451, 455.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and memorandum opinion of the Ninth Circuit.

Respectfully submitted,

ARTHUR E. SCHWIMMER

Counsel for Petitioner

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HAROLD E. RANKIN, JR.,	)	F I L E D
	)	APR 27 1979
Plaintiff-Appellant	)	EMIL E. MELFI, JR.
	)	Clerk U.S. Court
vs.	)	of Appeals
	)	
TEXACO, INC.,	)	No. 76-3471
	)	
Defendant-Appellee	)	MEMORANDUM

Appeal from the United States District Court for the Central District of California

Before: Hug and Tang, Circuit Judges, and Burns, District Judge*

Harold E. Rankin was a Texaco service station lessee-operator. He sued Texaco for breach of contract and fraud, alleging that Texaco failed to supply him with the amount of gasoline specified in their contract. Texaco based its defense on a "Force Majeure" clause contained in the contract as well as California Commercial Code §2615.

*Honorable James M. Burns, United States District Judge for the District of Oregon, sitting by designation.

At the close of trial, the district court inadvertently began a charge to the jury that it "must be satisfied of the defendant's guilt beyond a reasonable doubt." Realizing its mistake, the court told the jury "excuse me" and "let me restate that to you." It then proceeded to instruct the jury on the correct burden of proof, reiterating on nine occasions that Rankin had to prove his case by a preponderance of the evidence. Rankin made no objection to the jury instructions as given or the manner in which they were corrected. The jury returned a verdict for Texaco. Rankin now appeals, contending that the district court's erroneous reference during the jury instructions requires reversal.

Under Fed. R. Civ. P. 51:

> . . .No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. . .

Rankin failed to object to the instructions he now claims were prejudicial

and we are precluded by Rule 51 from reviewing them.

Rankin urges that we should apply the "plain error" doctrine and review the challenged instructions. Despite numerous opportunities, this circuit has not adopted the plain error doctrine in civil cases and we decline to do so now. See e.g., Monsma v. Central Mutual Insurance Co., 392 F.2d 49, 52-53 (9th Cir. 1968). Neither do we decide whether the district court's attempt to correct the instructions satisfies the requirements set forth in Seltzer v. Chesley, 512 F.2d 1030 (9th Cir. 1975).

We do note, however, that our disposition causes no injustice. The district court's alleged error was a matter of inadvertence. As soon as it realized its mistake, which was before it had given the full instructions defining that burden of proof, it attempted to rectify it by discussing the correct burden of proof and by restating the proper legal standard several times throughout the instructions. Since this was the only error assigned, the judgment of the district court is AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HAROLD E. RANKIN, JR., Plaintiff-Appellant vs. TEXACO, INC., Defendant-Appellee	F I L E D JUL 9 1979 EMIL E. MELFI, JR. Clerk, U.S. Court of Appeals No. 76-3471 ORDER

Before: HUG and TANG, Circuit Judges, and BURNS,* District Judge

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing is rejected.

*Honorable James M. Burns, United States District Judge for the District of Oregon, sitting by designation.

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Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

RESPONDENT'S BRIEF IN OPPOSITION.

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Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

RESPONDENT'S BRIEF IN OPPOSITION.

Question Presented.

In this civil case, plaintiff and petitioner Harold E. Rankin, Jr. (hereinafter "plaintiff"), contends that the trial court did not take sufficient steps to correct an inadvertent statement that "the jury must be satisfied of the defendant's guilt beyond a reasonable doubt". At the conclusion of the instructions to the jury, plaintiff made no objection to the manner in which the jury instructions were given, or the manner in which the trial court corrected its misstatement. In fact, plaintiff's counsel twice specifically stated that he had no objection to the jury instruction as given.

Thus, the real issue presented in this petition is whether Rule 51 of the Federal Rules of Civil Procedure bars plaintiff's assignment of error.

Statement of Case.

A. Procedural Background.

While the trial court was giving the jury general instructions on direct and circumstantial evidence, it made the following statement (R. Supp. T. 317:3-19):

> "It is not necessary that facts be proved by direct evidence. They may be proved also by circumstantial evidence or by a combination of direct and circumstantial evidence.
>
> The law makes no distinction between direct and circumstantial evidence but simply requires that, before convicting a defendant, the jury must be satisfied of the defendant's guilt beyond a reasonable doubt—Excuse me.
>
> That, ladies and gentlemen, is what I am talking about in the late hours.
>
> Let me restate that to you, ladies and gentlemen. I just defined for you circumstantial and direct evidence.
>
> It is not necessary that facts be proved by direct evidence. They may be proved also by circumstantial evidence or by a combination of direct and circumstantial evidence. The law makes no distinction between direct and circumstantial evidence."

Shortly thereafter, the trial court properly instructed the jury on the burden of proof in a civil case, according to the instructions jointly prepared by the parties (R. Supp. T. 319:1 to 321:7; 323:8 to 324:15):

> "The burden is on the plaintiff in a civil action, such as this, to prove every essential element of his claim by a preponderance of the evidence.

If the proof should fail to establish any essential element of plaintiff's claim by a preponderance of the evidence in the case, the jury should find for the defendant.

To establish by a 'preponderance of the evidence' means to prove that something is more likely so than not so. In other words, a preponderance of the evidence in the case means such evidence as, when considered and compared with that opposed to it, has more convincing force and produces in your minds belief that what is sought to be proved is more likely true than not true.

In determining whether any fact in issue has been proved by preponderance of the evidence in the case, the jury may, unless otherwise instructed, consider the testimony of all witnesses, regardless of who may have produced them, and all exhibits received in evidence.

In the action for breach of contract, the existence of lease, the agreement of sale, the gasoline shortage—Excuse me. Let me start again.

Ladies and gentlemen, the causes of action here are two. The first one is for breach of contract, and the second one is for fraud. I am first going to discuss with you the cause of action for breach of contract, and then the cause of action for fraud, and then I will instruct you on the damage law as to the contract cause of action and the damage law as to the fraud cause of action.

In the action for breach of contract, the existence of the lease, the agreement of sale, the gasoline storage and withdrawal agreement, and the Texaco travel card agreement between the plaintiff Rankin and the defendant Texaco, for the service

station located at Newport and Victoria, in Costa Mesa, is admitted by the parties.

With respect to this breach of contract, plaintiff Rankin must prove each of the following by a preponderance of the evidence:

One, that plaintiff has fully performed each and every condition and term of the contract on his part to be performed, not waived by Texaco;

Two, that the defendant Texaco breached its agreement with plaintiff by failing to supply him with gasoline as provided by the terms of the agreement of sale;

Three, that plaintiff Harold Rankin suffered damages as a proximate result of the breach of the agreement of sale by defendant Texaco;

Four, the amount of damages suffered by plaintiff Harold Rankin as a result of the breach of the agreement of sale.

If defendant Texaco Inc. is not excused from full performance of the agreement of sale by the terms of that agreement, then Texaco must prove by a preponderance of the evidence that it notified plaintiff Rankin, either orally or in writing, that Texaco would allocate its available gasoline supplies; that it provided plaintiff Rankin with an estimate of what his allocation would be, and that it allocated its available gasoline supply in a fair and reasonable manner.

Now, with regard to the action for fraud and deceit, plaintiff Harold Rankin must prove, with regard to this action, each of the following elements and prove them by a preponderance of the evidence:

First, that the defendant Texaco represented to plaintiff that plaintiff would receive at least 60,000 gallons of gasoline per month to continue the operation of his service station during the voluntary allocation program;

Second, that this representation was false;

Third, that defendant Texaco knew or should have known that the representation was false at the time it was made;

Fourth, that defendant Texaco must have made the representation with the intent to defraud plaintiff; that is, that defendant must have made the representation for the purpose of inducing plaintiff to rely thereon and to act or refrain from acting in accordance with such reliance;

Fifth, that plaintiff must have been unaware of the falsity of such representation when it was made;

Sixth, that plaintiff relied upon the representation and was deceived by it;

Seventh, that the plaintiff was justified in relying upon the representation; and

Eighth, that the false representation was the proximate cause of damage to the plaintiff, and, if so, in what amount.

If you find that the plaintiff has established each of these elements by a preponderance of evidence, then you should return a verdict for the plaintiff. If, on the other hand, you find that the plaintiff has failed to establish any one or more of these elements, then you must find for the defendant with respect to the plaintiff's action for fraud and deceit."

Thus, the jury was properly instructed on the issue of the burden of proof in a civil case.

B. Statement of Facts.

In December, 1969, plaintiff became a Texaco retailer at the service station located at Newport Boulevard and Victoria, Newport Beach, California. The terms of the agreements between plaintiff and defendant-respondent Texaco Inc. (hereinafter "Texaco") were set forth in a Lease (Ex. 1), and Agreement of Sale (Ex. 2), a Gasoline Storage and Withdrawal Agreement (Ex. 3) and a Texaco Retailer Travel Card Agreement (Ex. 4; R.T. 109:9 to 110:23). Texaco supplied plaintiff with gasoline pursuant to the terms of the Agreement of Sale and the Gasoline Storage and Withdrawal Agreement.

Plaintiff sued Texaco for breach of contract for failing to provide plaintiff with 720,000 gallons of gasoline in 1973, the contract maximum set forth in the Agreement of Sale. Texaco's defense was based on a "force majeure" clause contained in the Agreement of Sale, as well as California Commercial Code Section 2615. Plaintiff's cause of action for fraud was based on an alleged representation that plaintiff would receive at least 60,000 gallons of gasoline per month from Texaco during Texaco's voluntary allocation program (R. Supp. T. 229:6 to 235:5).

In response to a worldwide crude oil shortage, on May 10, 1973, the Federal Government announced a "voluntary" program for the allocation of crude oil and refined petroleum products, which was to be administered by the Office of Oil and Gas of the Depart-

ment of the Interior (R.T. 116:2 to 117:2; R. Supp. T. 168:9 to 170:5; Exs. E, F). Pursuant to this allocation program, Texaco was to make available to each of its customers a proportionate share of its available supplies according to each customer's respective purchases during an established base period.

Texaco immediately notified each of its customers, in writing, that it would allocate its available gasoline supplies according to the amount of gasoline each customer purchased during the corresponding month in 1972 (Ex. AF). Plaintiff's notice was personally delivered to his service station on Saturday, May 12, 1973, by his Texaco Marketing Representative (R. Supp. T. 394:10 to 395:8). Beginning in May, 1973, Texaco allocated its available supply of gasoline on a monthly basis (R. Supp. T. 183:5-16; Exs. H, I, J, K, L, M, N, O, P, Q, R, S, T, U, and V). In order to determine each monthly allocation formula, Texaco matched its demand for gasoline (the base period reference month) against its anticipated available supply for that month (R. Supp. T. 178:8 to 180:22). Plaintiff's allocation of gasoline for each month was calculated on the basis of this formula, and he was advised each month of the amount of gasoline Texaco would make available to him (R.T. 398:11 to 401:21; Exs. W, X, Y, Z, AA, AB, AC, and AD).

Throughout 1973, plaintiff received his gasoline on the basis of the same allocation program as all other Texaco customers (R.T. 357:5-15; 413:13-15).

REASONS FOR DENYING THE WRIT.

Plaintiff's Assignment of Error Is Barred by Rule 51 of the Federal Rules of Civil Procedure.

Rule 51 of the Federal Rules of Civil Procedure states:

> ". . . No party may assign as error the giving or failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and grounds of his objection. . . ."

The purpose of Rule 51 is to prevent unnecessary new trials because of errors the judge might have corrected if they had been brought to his attention at the proper time. *Cohen v. Franchard Corp.* (2nd Cir. 1973) 479 F. 2d 115, cert. denied 414 U.S. 857).

Plaintiff failed to raise any objection to the jury instructions as given, or the manner in which the trial court corrected its misstatement which is now the subject of this appeal. In fact, at the conclusion of the reading of all of the instructions, plaintiff's counsel twice specifically stated, in response to questions from the court, that he had no objections to the instructions as given (R. Supp. T. 332:17 to 334:8). Plaintiff did not raise this issue as error until the motion for a new trial.

Beginning with *Lynch v. Oregon Lumber Co.* (9th Cir. 1939) 108 F. 2d 283, the Ninth Circuit has consistently applied Rule 51 in civil cases. In *Bertrand v. Southern Pacific Company* (9th Cir. 1960) 282 F. 2d 569, cert. denied 365 U.S. 816, the court stated that "whatever the rule may be elsewhere, in this circuit the 'plain error' rule may not be utilized in civil appeals

to obtain a review of instructions given or refused, where the ground asserted was not raised in the trial court."

As the jury instructions given in this case were proper, and on the separate basis that no objection was made by plaintiff as to the jury instructions as given at the time of trial, there is no basis for granting plaintiff's writ in this case.

The Jury Was Properly Instructed on the Issue of Burden of Proof.

The test to be applied in reviewing jury instructions is whether, looking to the instructions as a whole, the substance of the applicable law was fairly and correctly covered. *Pollock v. Koehring* (9th Cir. 1976) 540 F. 2d 425. On this basis, it is clear that the instructions given the jury in this case were proper. The jury was instructed on nine separate occasions in the instructions quoted, that the burden of proof was the "preponderance of the evidence" standard.

Additionally, in at least two cases, it has been held that a reference to a "beyond a reasonable doubt" standard in a civil jury instruction was not error, even when applying a "fundamental error" or "plain error" standard on appeal. In *Talcott v. Midnight Publishing Corp.* (5th Cir. 1970) 427 F. 2d 1277, the appellant complained that fundamental error was committed, to which no objection was raised at the trial court level, when the court included the following words in its charge on burden of proof:

> "By a fair preponderance of the evidence is meant that if you hesitate or are doubtful as to whether your verdict should be in favor of the plaintiff, then the plaintiff has failed to satisfy you by a fair preponderance of the evidence."

The language of the court in *Talcott* is quite significant in the context of this writ. In finding no reversible error, the court stated:

> "We agree that, standing alone, the above words do not accurately reflect a correct statement of the plaintiff's burden of proof in civil litigation. But immediately following this language, the district judge undertook an extensive discussion of the proper standard, employing the classic examples weighing and balancing the evidence and explaining the correct meaning of the preponderence of the evidence. Reading the charge as a whole, it is clear that the jury was more than adequately instructed in proper evaluation of the plaintiff's case. Any harm or confusion which could conceivably have inured from the inaccuracy of the court's initial explanation was obviated by its extensive spelling out of the correct standard. *In addition, we note that the appellants took no specific exception to this portion of the charge under Rule 51 and thus, absent the finding of fundamental error—which we do not perceive here—no grounds for a new trial are presented.* (Citations)." (Emphasis added).

In *McIntosh v. Eagle Fire Co.* (8th Cir. 1963) 325 F. 2d 99, the use of the following jury instruction on burden of proof was held not to be plain error:

> "The court instructs you that while the burden of proof is upon the defendant to establish that plaintiff . . . intentionally set the fire mentioned in the evidence, nevertheless you are instructed that this fact does not need to be established

> beyond a reasonable doubt, but it is sufficient that it is established by the greater weight of the credible evidence."

In affirming the jury verdict, the court held that when consideration was given to the charge as a whole, it did not believe that the burden of proof was so misplaced or overemphasized that the jury was misled, or that the plaintiff's right to a fair trial was prejudiced.

Conclusion.

For the foregoing reasons, a writ of certiorari should not issue to review the judgment and memorandum opinion of the Ninth Circuit.

Respectfully submitted,

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